

SPICER ICE & COAL CO.

MARCH 20, 1956.—Committed to the Committee of the Whole House and ordered to be printed

Mr. MILLER of New York, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 1476]

The Committee on the Judiciary, to whom was referred the bill (H. R. 1476) for the relief of Spicer Ice & Coal Co., having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The purpose of this legislation is to pay the sum of \$3,354.56 to the Spicer Ice & Coal Co., of Groton, Conn., in full satisfaction of its claim against the United States for additional compensation equal to the difference between the amount it received for coal delivered to the Coast Guard Academy, under contracts, and the amount it would have received if it had anticipated the termination of legislation under which it received from the OPA, during a portion of the time in which deliveries were made under such contracts, a compensatory adjustment to assist such company in defraying the payment of freight charges upon coal so delivered.

STATEMENT

Contracts Nos. T44 cg-10 and T44 cg-11 were entered into on June 4, 1946, between the Government and this claimant for the delivery of coal to the Coast Guard Academy during the period July 1, 1946, to June 30, 1947. These contracts were based on a unit price, subject to adjustment either up or down in the event that the applicable OPA maximum price ceiling was changed. Also the contracts provided, with respect to freight charges, as follows:

Freight charges.—The contract price of coal, if inclusive of freight charges from point of shipment named herein, is based upon the freight rate in effect on date of the signing of this contract, and any increase or decrease in said freight rate shall correspondingly increase or decrease the purchase price of the

coal on any tonnage shipped thereafter: *Provided, however,* That the decrease shall not reduce the contract price below the current applicable minimum price.

As of November 10, 1946, the OPA discontinued the compensatory adjustment program. Freight rates were increased, the increase to become effective January 1, 1947.

The bill is for the amount of \$3,354.56, presumably the amount equal to the difference between the amount it received for coal delivered to the Coast Guard Academy, under contracts, and the amount it would have received during a portion of the time in which deliveries were made under such contracts had it anticipated the termination of legislation under which it received from OPA an adjustment to assist it in defraying the payment of freight charges.

The Company had a contract with the Coast Guard Academy which provided for allowances under the possible contingency of increase of rates under the Price Control Act. Said contract did not provide for the possible contingency of suspension or removal of price control or the discontinuance of such control as the result of the expiration of the act. The committee feel that since apparently it was the intention of the Coast Guard to take care of this company for increases caused by raise in rates under the act, it is only fair that the company be compensated for increase caused by the expiration of the act. Apparently, it was an oversight in not providing for this contingency under the contract but since it was the intention of the Coast Guard to take care of the company for increases, it is equally fair that such increases be taken care of, even though they occurred by reason of the expiration of the act.

Therefore, the committee recommends that the bill be favorably considered.

Attached hereto and made a part of this report are the following letters:

(1) One dated April 27, 1949, from the Treasury Department to the Justice Department; and

(2) One dated November 29, 1949, to the chairman of this committee, Hon. Pat McCarran, from the Justice Department.

TREASURY DEPARTMENT,
Washington, April 27, 1949.

Hon. PEYTON FORD,

The Assistant to the Attorney General,

Department of Justice, Washington, D. C.

Reference is made to your letter of March 1, 1949, requesting the views of the Treasury Department on S. 619, a bill for the relief of the Spicer Ice & Coal Co.

The purpose of S. 619 is to provide for the payment of \$3,354.56 to the Spicer Ice & Coal Co. in full satisfaction of the claim of said company against the United States for additional compensation for coal delivered to the Coast Guard Academy under contracts T44cg-10 and T44cg-11, to compensate for the termination of compensatory adjustments from the Office of Price Administration to assist the Spicer Co. in defraying the payment of higher freight charges due to shipment of coal by rail instead of by water.

S. 619 is based on contracts T44cg-10 and T44cg-11, dated June 4, 1946, for delivery of coal to the Coast Guard Academy during the term July 1, 1946, to June 30, 1947, at a unit contract price subject to readjustment in the event that the applicable OPA maximum ceiling was adjusted upward or downward. The contracts also contained the following provision with respect to freight charges:

"Freight charges.—The contract price of coal, if inclusive of freight charges from point of shipment named herein, is based upon the freight rate in effect on date of the signing of this contract, and any increase or decrease in said freight rate shall correspondingly increase or decrease the purchase price of the coal on any tonnage shipped thereafter: *Provided, however,* That the decrease shall not reduce the contract price below the current applicable minimum price."

By letter dated January 25, 1947, the Spicer Ice & Coal Co. submitted claims to the supply officer, United States Coast Guard Academy, of \$768.87 with respect to contract T44cg-10 and \$222.99 with respect to contract T44cg-11, for delivery of coal during the month of January 1947. Said claims were based on the allegation that on November 10, 1946, the Office of Price Administration discontinued the compensatory adjustment program, and that the contractor continued to deliver coal at the contract price without being reimbursed for the lost subsidy or for the increased freight rate, effective January 1, 1947. Said claims in the total amount of \$991.86 were forwarded by the Coast Guard to the General Accounting Office on March 18, 1947, with the recommendation that same be disallowed. The General Accounting Office in settlement certificates dated August 5, 1947, claim No. 1028627 (4), and November 5, 1947, claim No. 1028627 (3), disallowed both claims. With respect to contractor's claim based on the discontinuance of the compensatory adjustment program, the General Accounting Office pointed out in said settlement certificates that there was nothing in the contracts providing for a price increase in the event of a suspension or removal of price control or the discontinuance of such control as the result of the expiration of the act; with respect to the claims based on the alleged freight increases the General Accounting Office advised the contractor that it was incumbent upon a claimant to furnish evidence satisfactorily establishing their claims.

The Coast Guard has no record of any claim submitted by the Spicer Ice & Coal Co. other than those submitted by the aforementioned letter, dated January 25, 1947, and has no record of the submission of any evidence to support the contractor's allegation of increased freight charges or the basis for relief in the amount of \$3,354.56 contained in S. 619.

In view of the foregoing, there would appear to be no justification for recommending relief in this case.

Very truly yours,

E. H. FOLEY, Jr.,
Acting Secretary of the Treasury.

DEPARTMENT OF JUSTICE,
OFFICE OF THE ASSISTANT TO THE ATTORNEY GENERAL,
Washington, November 29, 1949.

HON. PAT McCARRAN,
Chairman, Committee on the Judiciary,
United States Senate, Washington, D. C.

MY DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 619) for the relief of the Spicer Ice & Coal Co.

The bill would provide for payment of the sum of \$3,354.56 to the Spicer Ice & Coal Co., Groton, Conn., in full satisfaction of its claim against the United States for additional compensation equal to the difference between the contract prices at which coal was delivered by such company to the Coast Guard Academy, New London, Conn., and the prices which it would have bid on the coal contracts if it had anticipated the termination of the legislation under which it received from the Office of Price Administration, during a portion of the time in which deliveries were made under such contracts, a compensatory adjustment to assist such company in defraying the payment of freight charges upon coal so delivered.

In compliance with your request, a report was obtained from the Treasury Department concerning this legislation. That report, which is enclosed, states that claimant company entered into contracts for delivery of coal to the Coast Guard Academy during the term July 1, 1946, to June 30, 1947, at a unit contract price subject to readjustment in the event that the applicable OPA maximum price ceiling was adjusted upward or downward. The contracts also contained a provision to the effect that the contract price of the coal was based upon the freight rate in effect at the date of the signing of the contract and that any increase or decrease in such rate would correspondingly increase or decrease the purchase price of the coal shipped thereafter, provided that the decrease would not reduce the contract price below the current applicable minimum price.

The company submitted claims in the amounts of \$768.87 and \$222.99 for delivery of coal during the month of January 1947, which claims were based on the allegation that on November 10, 1946, the Office of Price Administration had discontinued the compensatory adjustment program and that the company had continued to deliver coal at the contract price without being reimbursed for the lost subsidy or for the increased freight rate, effective January 1, 1947. The claims were forwarded to the General Accounting Office with the recommendation that they be disallowed. That Office subsequently disallowed both claims. With respect to the company's claim based on the discontinuance of the compensatory adjustment program, the General Accounting Office pointed out that there was nothing in the contracts providing for a price increase in the event of a suspension or removal of price control or the discontinuance of such control as the result of the expiration of the act, and with respect to the claims based on the alleged freight increases, it advised the company that it was incumbent upon a claimant to furnish evidence satisfactorily establishing his claim.

The Treasury Department states that the Coast Guard has no record of any claim submitted by the company other than those mentioned and has no record of the submission of any evidence to support the company's allegation of increased freight charges or the basis for relief

in the amount of \$3,354.56 contained in the bill. The report concludes with the statement that in view of the foregoing there would appear to be no justification for recommending relief in this case.

The Director of the Bureau of the Budget has advised this office that enactment of this legislation would not be in accord with the program of the President, inasmuch as the claimant has failed to utilize the legal remedies afforded him in the Court of Claims.

Yours sincerely,

PEYTON FORD,
The Assistant to the Attorney General.

JANUARY 12, 1948.

Re the Spicer Ice & Coal Co. contracts with the Coast Guard Academy of New London, Conn.: Contract Nos. T44CG10 and T44CG11; claim Nos. 1028627 (4) and (3).

Hon. LINDSAY C. WARREN,
Comptroller General of the United States,
Washington, D. C.

(Attention: General Accounting Office, Claims Division.)

DEAR SIR: I represent the Spicer Ice & Coal Co., of Groton, Conn., claimant in the above matters. Would you be kind enough to refer to your letters of August 5, 1947, regarding No. T44CG10 and November 5, 1947, regarding No. T44CG11, both of which letters are identical. In each case, my clients made a claim against the Government for a portion of their loss on the two contracts by reason of the suspension of compensatory adjustments in November 1946 and by reason of freight increases from January 1, 1947, up to the date of the completion of the contract, June 30, 1947. My clients have turned the entire file over to me and it is my purpose in writing to you to lay claim to a total amount of \$3,910.88, representing \$962.34 on T44CG11 and \$2,948.54 on T44CG10.

In my clients' original letters to you making a claim to a portion of the above amounts, they inadvertantly made such claims in an erroneous fashion, for they requested payment for the lost subsidy on the basis of the price increase clause in the two contracts, which clause was added as a rider to each contract and was titled "Price Adjustment Based on Current Applicable Ceiling Prices." Since the OPA expired November 10, 1946, and at the same time the compensatory adjustment setup was also concluded, I agree with your letters above referred to that there is no basis to a claim for a price adjustment, as such. In addition, my clients failed to furnish proof as to the freight increase of January 1, 1947, so that that claim also was refused, for which see your letters above referred to.

The total amount claimed above is susceptible of being divided into two parts, i. e., a claim for the freight increase of January 1, 1947, and a claim based on the suspension of compensatory adjustment from November 10, 1946, on. With your kind indulgence I will discuss both matters separately.

A. *Claim for freight increase from January 1 to June 30, 1947.*—As per your letters of August 5 and November 5, 1947, it appears that our claim for a freight increase of 22 cents per ton was refused by virtue of our failure to furnish satisfactory evidence of said increase, as per 17 C. G. 831.

Please be advised that under order No. 15650, issued by the Interstate Commerce Commission, December 5, 1946, effective January 1, 1947, in ex parte 148 and 162, freight charges in the eastern zone were increased in the sum of 22 cents per ton. From January 1 to June 30, 1947, the latter being the termination date of our contract, my clients delivered 697,341 net tons of coal under T44CG11 and 1,831,392 net tons of coal under T44CG10. The above amounts are noted in the enclosed itemization on both contracts and may be substantiated by the signed invoices from the Coast Guard, all of which we have in our files, and copies of which the Coast Guard holds. This total tonnage of 2,528,733 net tons thus entitles my clients to \$556.32, by reason of the 22 cents per ton freight increase. We are, of course, clearly entitled to this under paragraph 5 of both contracts, and I do not believe that the Government will seriously dispute this.

B. Claim for additional payments by reason of the suspension of compensatory adjustment.—It is the contention of my clients and myself that we are definitely entitled to a repayment of the lost subsidy, at the very least, from January 1 to June 30, 1947. We base our claim upon several points and arguments which I will itemize hereunder. In order to facilitate matters, we are making no claim for any deliveries between November 10, 1946, and January 1, 1947, but are treating the entire question as one which arose on January 1, 1947. In addition, to further facilitate an understanding of our problem, I have had my clients make out an itemization of all the costs and prices involved in both contracts, as shown on the enclosed sheets, to which I will refer from time to time as the itemizations. A breakdown of said itemizations indicates that we are claiming \$808.92 on T44CG11 and \$2,545.64 on T44CG10, making a total claim by reason of the lost subsidy, of \$3,354.56.

1. It is our contention that paragraph 5 of both contracts clearly and specifically entitles us to the above amounts as freight increases. There can be no question, as indicated on the enclosed itemization, that my clients' bids for the Coast Guard coal were based on a certain net cost to them and that net cost included a certain net amount for freight. The net amount for freight was arrived at by deducting from the then existing freight charges the compensatory adjustment which the government was then paying. The resulting figure thus was, for all intents and purposes, the freight rate then in existence, so far as these contracts were concerned. It is our contention that, when compensatory adjustment ceased, the taking away of that adjustment figure of \$1.16 and \$1.39 on the respective contracts effectively brought about an increase in the freight rates, as clearly and as logically as if the ICC had raised the freight rates by those amounts. The fact remains that freight, instead of costing my clients, for example a net of \$4, commencing January 1, 1947, cost them \$5.16 or \$5.39 (the \$4 base rate being a fictitious figure, merely used to simplify the question). It will be noted that the contracts in no way confine the right to an increase under paragraph 5 to freight rate increases by reason of action by the ICC. It merely states that the contract price is based upon the freight rate in effect on signing the contract and "any increase or decrease in said freight rate shall correspondingly increase or decrease the purchase price of the coal." It is idle to argue that my clients set their contract figure without reference to the compensatory adjustment for it is obvious that, had compensatory adjustment not been taken into account, the contract price

would have been correspondingly higher because of the additional cost of freight. We claim, therefore, that the "effective freight rate" at the time of the contract was the existing freight rate less the compensatory adjustment, and any taking away of said adjustment thus increases the freight rate.

Even more serious than this, however, is the picture disclosed by the itemizations. You will notice that my clients anticipated a net return of roughly \$1.74 a net ton on T44CG11 and 66 cents on T44CG10. The discrepancy in these two figures is due to the difference in the quality and price of the coal. We then, however, find that by taking away the compensatory adjustment, my clients have ended by acquiring 14 cents net profit on T44CG11 and a 57 cents net loss on T44CG10. No coal dealer in America can do business on such a basis and the complete inequity of any decision against our claim is more than disclosed by these figures. However, at this point, I am not emphasizing the amount of profit or loss but merely trying to point out how evident it is that my clients made a bid based on a certain net freight rate which automatically rose because of the taking away of the subsidy.

2. The above discussion involves certain clear factual considerations. As a further argument, I would like to call to your attention the fact that, from time immemorial, a basic law of contracts has been that, where there are two parties to a contract and one of said parties suffers a loss, that loss may be recovered from the other party if the latter is the procuring cause of the damage. In other words, where A and B contract, A cannot so comport himself as to deliberately inflict damage upon B under said contract and if he does so, he is liable. That is exactly the situation in this case. The Government, with its superior powers, has taken away an important incident of the contract and has caused a loss to the innocent contracting party. Under principles of equity and common law, this constitutes an unjust enrichment on the Government's part and is contrary to all our concepts of law and ethics. It would certainly seem that the least the Government should have done under the circumstances would have been to release my clients from their contract or renegotiate the same. The fact that this is not provided for in the contract except under "Price increases" indicates quite clearly that neither party contemplated the suspension of compensatory adjustment payments. I will discuss this latter point more fully further on.

3. I draw your attention to paragraph 17 of both contracts. Although this paragraph is headed "Federal Tax," the wording of the same does not follow the heading. In this paragraph, it provides, inter alia, that if any sales tax, processing tax, adjustment charge, or "other taxes or charges are imposed or changed by the Congress" there shall be an appropriate change in the price. We contend that, by taking away the subsidy payments, an additional charge was imposed thereby by Congress, which calls for an appropriate change in price. This is as clearly a charge imposed by Congress as if it were a direct tax added to the price of the coal, so that, it might well be argued, aside from the freight rate contention, there has been an additional charge for which we should recover in full.

4. A further inequity is inherent in this contract. It will be noted in paragraph 7 under "Delays," that certain relief is given to the contractor where, inter alia, "acts of the Government" cause the same.

This question has arisen in my mind: Suppose that, because of the taking away of the subsidy, a dealer, operating on a small margin and holding a huge contract with the Government, is unable to raise sufficient money to pay the additional freight charges, thus causing a delay in delivery through an act of the Government. Under these circumstances, relief would be afforded to him under the contracts. It seems, therefore, that our situation is a stronger one and that relief should be afforded a man who goes ahead with his contract, despite hardships and additional costs, and completes his deliveries with great loss to himself. If an act of the Government could be foreseen in this clause, it is not unfair to request relief from an act of the Government not covered under the contract.

The counterargument to this is the very phrase I have used, i. e., that this type of thing is not mentioned in the contract. But there is another basic principle of law involved herein which should afford us relief. It is an accepted axiom of contracts and quasi-contracts that, where there is a mutual mistake of fact, there may be a reformation of the contract and relief from loss. All parties concerned, I know, will testify to the fact that all assumed that compensatory payments would continue for the life of the contract and had that assumption not been made, the contractor would have protected himself, and the Government, in all fairness, would have permitted him to so protect himself by an additional clause. The very absence of some such protective clause confirms that the assumption stated above was made. In other words, the contracts should be interpreted as containing the phrase, "Both parties agree that the agreed prices herein are based on the continuance of compensatory adjustment for the life of the contract." The discontinuance thereof would then be a condition subsequent, entitling the dealer to relief. I cannot see how the government can fail to recognize this and if this be admitted, the Government must and should give relief, on basic principles of law.

I submit therefore, that full payment should be made for the loss of the compensatory adjustment for the above several reasons. There are some other and perhaps extraneous considerations which I would like to bring to your attention. I would like to point out to you that payment hereunder would in no way subject the Government to anything further than what it contemplated in the beginning. In other words, the Coast Guard would be paying neither more nor less for its coal under this contract than at the outset. Furthermore, I am informed by the president of the New England Fuel Dealers Association that my clients' case is the only one he knows of in this whole section. I rather felt that there would be innumerable similar cases so that the Government might be faced with a considerable expense, rather than saving quite a bit of money at the expense of the people with whom it contracted. Although this is not a legal argument, from a practical viewpoint, it is a sound one, for I can understand that the Government might take a very firm position, even though unjustly, were it faced with hundreds of thousands of dollars worth of claims.

In addition, I would again like to stress the integrity and good faith of my clients who, instead of breaking off the contract and taking their chances that the Government would do nothing about it, continued to deliver the coal at a substantial loss. I would surmise

that the majority of the other dealers under the circumstances renegotiated their contracts or simply stopped delivery. This situation points up the difference between the contracting parties, one being bound to his contract and the other having the power to effectuate a change therein.

I feel so strongly about this situation that I fully intend to press this matter in the Court of Claims should I receive an unfavorable response from you. Frankly, I cannot see how this claim can be refused on any of the arguments, either on the basis of freight increase, mutual mistake of fact, the additional charge argument or the argument based upon the act of one contracting party causing loss to the other. However, I would be interested to know just what is the statute of limitations on a claim such as this so that I can preserve my clients' rights in the event of a refusal.

In conclusion, let me say that I feel this is the type of action which a police state would enter into blithely and casually but it is not one which should be readily adopted by our Government, whose very existence is based on the sanctity of contract.

I realize that this is a frightfully lengthy letter but, from my clients' point of view, there is a very large amount of money involved and it warrants all the time I have spent composing the same. I trust that your patience will permit you to give it full consideration. May I hear from you in the near future and I would very much appreciate it if, in your answer, you would advert to each of my arguments. I also trust that you will not allow my clients' previous claims to prejudice their position in any way, as I feel said claims were made upon an erroneous basis.

Respectfully yours,

MERRILL S. DREYFUS,
Attorney for the Spicer Ice & Coal Co.



